# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| DAVID T. HUNTER,<br><br>Appellant,<br><br>v.<br><br>REGENCE BLUE SHIELD, a Washington Corporation,<br><br>Respondent. | ) | No. 56638-5-I<br><br>**DIVISION ONE**<br><br>UNPUBLISHED OPINION<br><br>FILED: August 21, 2006 |

**APPELWICK, C.J.** — David Hunter elected to have a nerve-sparing radical prostatectomy at Johns Hopkins University following a diagnosis of prostate cancer. Regence BlueShield agreed that the procedure was medically necessary, but asserted that Hunter could receive the care in Washington state. Regence therefore denied coverage for the out-of-area procedure under the terms of Hunter's contract. Hunter brought several claims against Regence, arguing that Regence breached a duty to identify local, contracted providers who could perform the nerve-sparing procedure. The trial court dismissed Hunter's claims. We conclude that Hunter has not identified any contractual or other source imposing a duty on Regence to identify individual contracted providers,

as opposed to classifications of providers, who perform particular procedures or to qualitatively compare their results with those of other providers. We also conclude that Regence did not act in bad faith in denying Hunter's preauthorization request. We affirm.

## FACTS

We present the facts in the light most favorable to Hunter as the nonmoving party. See Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). At age 51, Hunter had a routine physical examination that ultimately led to a diagnosis of prostate cancer. Hunter and his wife researched various treatment options. They decided that radical prostatectomy, or surgical removal of the prostate gland, held the best prospect for long-term survival. Hunter learned of a microsurgical technique called nerve-sparing radical prostatectomy. This technique can preserve the nerve bundles necessary for erectile function and potentially avoid two common side-effects of prostate surgery, impotence and incontinence. Hunter learned that doctors at the Brady Urological Center at Johns Hopkins University Medical Institute (Hopkins) had pioneered this technique and had an excellent record for minimizing these side-effects.

On March 13, 2000, Hunter emailed Dr. Ronald Rodriguez at Hopkins. Hunter asked Rodriguez:

> 1. Who in the Seattle area is most familiar/competent with your surgical techniques?
>
> 2. Does your center accept out-of-state patients? If so, what's the drill?

Rodriguez wrote back that a Seattle-area physician he knew, Dr. Gerald Murphy,

had died a few months earlier, and that Hunter would be a candidate for surgery at Hopkins only if he came for an evaluation.

On March 14, Hunter met with Dr. Robert Gibbons, a surgeon and urologist who was then the head of the urology department at Virginia Mason. Gibbons did not perform the nerve-sparing procedure. Gibbons believed that impotence resulting from a radical prostatectomy is "one hundred percent fixable" with pills, pumps, or vacuum devices. The Hunters were disheartened that Gibbons considered such a result satisfactory. They considered Gibbons' sole concern to be cutting out the malignant cancer, with no regard for post–surgical quality–of–life issues.

During their conversation with Gibbons, the Hunters mentioned their contact with a doctor at Hopkins. Gibbons mentioned a local urologist, Dr. Robert Weissman, who had trained at Hopkins several years earlier and had been at Virginia Mason for the last 15 years. From this timing, Hunter assumed that Weissman had trained at Hopkins before the nerve-sparing procedure was developed. Hunter did not call Weissman or inquire about the nature of Weissman's practice. Gibbons did not expressly tell Hunter that Weissman had learned to perform the nerve-sparing procedure. Gibbons also did not tell Hunter that Weissman currently performed the nerve-sparing technique.

Hunter knew of no local physician who could perform the nerve-sparing procedure. On March 24, the Hunters made contact with Suzanne Glasoe, an operations supervisor at Regence. They asked Regence to preauthorize an

initial evaluation and possible out-of-state treatment at Hopkins. Glasoe asked for a doctor's letter stating "what would be performed, why and why not in Seattle."

In response to Glasoe's request, Hunter sought a referral from his family physician, Dr. Greg Keyes. Hunter wrote to Keyes explaining his circumstances, discussing his research into the services available at Hopkins, and explaining that Regence needed a doctor's referral stating that he should get the surgery at Hopkins. Hunter informed Keyes that Gibbons refused to refer Hunter to Johns Hopkins because he said "there are plenty of fine surgeons here that can do radical prostatectomies." Keyes wrote a letter to Regence, which stated in full:

> This note is to confirm that David Hunter has recently been diagnosed with prostate cancer. He will be treated at Johns Hopkins Medical Center for this.
>
> If there are questions or concerns regarding this, please contact my office.

Glasoe received Keyes' letter on March 30. Glasoe informed Hunter that the letter was "not a completed request for special consideration of treatment out of state." Hunter responded, telling Glasoe why he believed treatment at Hopkins was justified:

> I have checked in Seattle, and the most recent surgeon who trained at Brady is a surgeon at VA Mason who is 15 years out of the program and is not current on the state-of-the-art techniques. The issue here is not the removal of the prostate, but rather making sure that the bladder muscles and penile erection nerves are identified, preserved, not bruised, and afforded the best opportunity to recover. Simply put, I don't want to go through a radical [prostatectomy] and then spend the next 15 years in urology departments dealing with [incontinence] and impotency because I allowed someone to go in and perform the surgery using 15 year-old techniques. Lastly, Johns Hopkins is a Blue Shield facility and

> can bill direct to Regence or go through Blue Shield of Maryland, if you want them to review the bill on your behalf. Since all the physicians are on the JH faculty and staff, I'd be willing to bet that the cost is comparable to that in Seattle.

Glasoe forwarded Hunter's request to another Regence employee, Suzy Fong, R.N. Fong wrote:

> The patient conducted his own research regarding this procedure and feels that he can receive better surgical post-operative outcomes from the John[s] Hopkins University Medical Center. The Brady Urological Center at Johns Hopkins University pioneered the nerve bundle separation techniques as well as several other nerve saving procedures. The patient feels that he will have better long-term results post-operatively with potency retention and continence retention. He had asked his physician to send a letter of referral but he declined as he feels "there are plenty of fine surgeons here that have been doing these operations for a long time". Mr. Hunter feels that there is no one here in the Seattle area that has as low of post-operative side effects as they have at Johns Hopkins University. Mr. Hunter also feels that the different philosophy of blood requirements for the procedure and the microsurgery technique used at Johns Hopkins University is more advantageous to him than what is being offered here in the Seattle area.

Fong recommended denial of the request for preauthorization, based on the language of Hunter's insurance contract. The contract provides:

> No Benefits will be provided in cases where a Patient leaves his or her state of residence for the purpose of obtaining care for any condition unless, in the determination of the Company, care cannot be provided in that state, and is Medically Necessary. Care must be approved in advance in writing by the Company.[1]

Fong recommended that Regence deny Hunter's request because "Mr. Hunter does have a medical necessity for the surgical procedure but there are providers in the area that can provide the care needed." Larry Donohue, M.D., reviewed

[1] Similar language is included in the summary booklet of the contract. This booklet states: "No benefits will be provided when you leave your state of residence for the purpose of obtaining care for any condition unless medically necessary. Care must be approved in advance, in writing, by the Company or the local Medical Service Bureau."

Fong's recommendation. Donohue wrote, "The surgery is available in the area, so it is a contract exclusion to pay benefits to The Johns Hopkins. I agree with your analysis and recommendation."

On March 30, Glasoe informed the Hunters that their request was denied. On March 31, Hunter had his consultation with Rodriguez at Hopkins. Hunter wrote back to Glasoe the following week, on April 6. He informed Glasoe that Rodriguez had discovered a nodule on his prostate that had not been identified by any of his treating physicians in Seattle, and that his diagnosis was elevated to a more advanced stage of prostate cancer.[2] Hunter also wrote:

> Needless to say, I'm not happy with the treatment I've received locally, and I would like your medical director to give me the name and address of anyone in Seattle with the skill or experience of Doctor Ronald Rodriguez, M.D., Ph.D. at Johns Hopkins in the nerve sparing prostate surgical techniques developed at the Brady Urological Center.
>
> I will want to have a face-to-face with whomever is going to make the final yes or no on this at Regence. I can get a letter from Dr. Rodriguez, if necessary.

Rodriguez sent a letter to Regence on April 10, in which he supported Hunter's request:

> There are only a handful of centers in the country that can report excellent results in terms of margin-negative rates, and surgical outcomes. Foremost among these, as you I'm sure are aware, is Johns Hopkins. Not only do we have the best overall surgical results of any group in the United States . . . I truly do not believe that he can achieve the same type of care anywhere in the state of Washington as he would receive if he were treated at Johns Hopkins.

[2] Rodriguez testified that this nodule may have been a reaction to a recent biopsy, and most of it was resolved between the time of the consultation and when Hunter came in for his surgery. Nevertheless, he testified that a careful examination would have identified the more advanced stage lesion.

In a follow-up letter to Regence on April 16, Hunter wrote:

> this will confirm that, notwithstanding Regence Blue Shield's March 31st letter, I have decided to have my radical prostatectomy surgery performed by Dr. Ron Rodriguez, PhD, MD at the Johns Hopkins University Hospital. . . . At this juncture, while I recognize that a number of surgeons in Seattle perform radical prostatectomy procedures, I have been unable to identify any local surgeon who has the training, experience, and skill of the current team of prostate surgeons at the Brady Urological Center of Johns Hopkins University.

Donohue asked Rodriguez for peer-reviewed literature supporting his assertions. Rodriguez responded that the "literature abounds with studies indicating superior outcomes from a handful of centers [including Hopkins] compared to the remainder of the country." He cited two published studies. Donohue emailed the author of one of the studies, asking whether her study supports findings that the results from nerve-sparing radical prostatectomy are superior in Baltimore than in Seattle. The author, citing selective reporting and methodological issues with the study, responded that "[t]here are local physicians that can probably do surgery as well as those at Hopkins."

Donohue also called Dr. Paul Lange at the University of Washington, and asked him whether the nerve-sparing procedure is done locally. Lange told Donohue that the UW does that surgery, and that "their results are comparable to those achieved at The Hopkins." Donohue concluded that "[b]ased on all the above, I cannot determine that the service is not available in the service area, so there is not a medical necessity basis for authorizing the member to go out of the service area as his contract requires." An independent review organization

upheld Regence's decision. Regence denied Hunter's appeal on May 4, 2000.

Hunter underwent a nerve-sparing radical prostatectomy at Hopkins on May 10, 2000. On May 8, 2003, Hunter served a complaint on Regence asserting claims for breach of contract, outrage, bad faith, and violation of the Consumer Protection Act (CPA). The trial court granted summary judgment to Regence on the breach of contract claims because they were barred by the contractual limitation period. The trial court later granted summary judgment on Hunter's remaining claims. The trial court held that Hunter had provided no authority requiring health care services contractors to refer subscribers to specific providers or make a qualitative evaluation of the skill and experience of a provider. Hunter appeals.

The dispute between Hunter and Regence turns on whether Regence was under a statutory or contractual obligation to provide Hunter with names of individual providers who could do the nerve-sparing procedure, or only to provide names of providers who specialized in the practice area that included the procedure and rely upon those providers to make the appropriate referrals for particular procedures. It is undisputed that the nerve-sparing procedure was available in Washington state in spring 2000.[3] Hunter contends that Regence had a statutory and contractual duty to identify providers who could do the

[3] Gibbons testified that Drs. Weissman and Ellis at the University of Washington, Gottesman at Swedish Hospital, and Nellans at Overlake Hospital all performed the procedure. Weissman testified that he performed the procedure, and that he was performing it in spring 2000. Keyes testified that he knew that Drs. Jim Gottesman and Randy Pritchett were doing the procedure in Washington. Lange also performed the procedure. Rodriquez was aware that Lange was performing the procedure, and considered Lange an "outstanding surgeon and an outstanding physician."

procedure. Regence argues that they have no obligation to do so, and that

doing so could expose them to malpractice liability.

## ANALYSIS

### Standard of Review

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. Schaaf, 127 Wn.2d at 21. A material fact is one upon which the outcome of the litigation depends. Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). We review questions of law de novo.[4] Mains Farm Homeowners Ass'n v. Worthington, 121 Wn.2d 810, 813, 854 P.2d 1072 (1993). We also review de novo evidentiary rulings made in conjunction with a summary judgment motion. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) ("The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.").

### I. Hunter's Breach of Contract Claims Were Untimely Filed

Hunter's contract with Regence provides:

> REVIEW OF COMPLAINTS AND REJECTED CLAIMS. . . . In any event, no action at law or in equity shall be commenced against the Company for any claim under this contract unless brought within two Years after the rendering of the services upon which such claim is based.

This limitation period was also set out in the benefits booklet. Hunter filed his

[4] Because this court reviews the trial court's summary judgment order de novo, we need not address whether the trial court abused its discretion in denying Hunter's motion for reconsideration.

complaint more than two years after the rendering of services upon which his claim was made. Hunter argues that the contractual limitation of two years is unconscionable and against public policy. Hunter argues that the reduced limitation period gives sick insureds very little time to recover before requiring them to refocus and file a suit, and "raises questions of fact as to whether Regence's burying of the two-year limitation in the middle of a long and complex adhesion contract was unreasonable and/or against public policy." Hunter also argues that Regence acted in bad faith and should be estopped from asserting the two-year contractual limitation period.

The contractual limitation period is enforceable. A contractual limitation prevails over a general statute of limitation unless the provision is prohibited by statute or public policy or is unreasonable. Wothers v. Farmers Ins. Co., 101 Wn. App. 75, 79, 5 P.3d 719 (2000). RCW 48.18.200 prohibits limitation of action in insurance policies for periods of less than one year. Thus, the statute impliedly authorizes, but does not require, contractual limitations periods of one year. Ashburn v. Safeco Ins. Co., 42 Wn. App. 692, 696-97, 713 P.2d 742 (1986).

Washington courts consistently uphold contractual limitation provisions in insurance contracts. See, e.g., Panorama Village Condominium Owners Ass'n v. Allstate Ins. Co., 144 Wn.2d 130, 138-39, 26 P.3d 910 (2001) (enforcing one year suit limitation clause in property insurance policy); Wothers, 101 Wn. App., at 79-80 (same); Ashburn, 42 Wn. App. at 695 (noting that insurance contracts

may include reasonable limitations on liability and that Washington courts have upheld 1-year limitations in insurance contracts, and listing cases); Simms v. Allstate Ins. Co., 27 Wn. App. 872, 873-74, 877, 621 P.2d 155 (1980) (upholding one year limitation period in fire insurance policy). "Washington courts rarely invoke public policy to override express terms of an insurance policy." Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 876 n.1, 784 P.2d 507 (1990).

Hunter relies on Baker v. City of Seattle, 79 Wn.2d 198, 484 P.2d 405 (1971), to argue that the clause is inconspicuous and should not be enforced. In Baker, a liability disclaimer was placed in the middle of a lease agreement for a golf cart. The court held that a disclaimer was void because the plaintiff unwittingly signed the disclaimer that was "contained in the middle of the agreement and was not conspicuous." Baker, 79 Wn.2d at 202. The clause at issue here is not a disclaimer clause but a contractual limitation period. Thus, the Baker case is inapposite. While it is true that the contract is 55 pages long, the limitation language is appropriately located in a paragraph entitled "REVIEW OF COMPLAINTS AND REJECTED CLAIMS." The section at issue is a single paragraph describing the appeals process for rejected claims and setting out several limitation periods for appeals of denied claims. The language is no less conspicuous than any other language in a long contract.

We also reject Hunter's argument that Regence should be estopped from

asserting the limitation period because it acted in bad faith.[5] First, as discussed in detail below, Regence did not act in bad faith. Moreover, the contractual limitation period would be enforceable even in the face of bad faith by Regence. See, e.g., Simms, 27 Wn. App. at 873, 878 (applying contractual limitation period to plaintiff's contract claim despite allegations of bad faith). Finally, in the first-party context, coverage by estoppel is not the appropriate remedy for insurance bad faith. Coventry v. Am. States Ins. Co., 136 Wn.2d 269, 284, 961 P.2d 933 (1998). Thus, even if Regence acted in bad faith, it should not be estopped from asserting the contractual limitation to deny coverage.

The two-year contract limitation period is enforceable. Hunter filed his lawsuit more than two years after "the rendering of the services upon which such claim is based." His contractual claims were untimely and the trial court properly dismissed them.

**II. The Trial Court Properly Considered Dwight Johnson's Declaration**

In response to Regence's motion for summary judgment, Hunter stated that "according to Interrogatory answers from Regence, Dr. Robert Weissman was not a Regence Preferred Provider at the time in question." Hunter relied on this interrogatory and answer:

> INTERROGATORY NO. 2: Please identify each Approved Provider urologist surgeon within Regence Blueshield's (RBS's) service area known to RBS in May 2000, who possessed training, experience and demonstrated proficiency in "nerve sparing" radical prostatectomy surgical techniques.

[5] Hunter briefly contends that Regence acted in bad faith simply by imposing a contractual limitation period shorter than the statutory period. Hunter provides no authority to support the argument that merely imposing such a limitation period is, in itself, an act of bad faith. We note that Regence could not have acted in bad faith in imposing an enforceable contractual limitation provision.

> ANSWER: Objection, this request . . . is vague and ambiguous with respect to plaintiff's meaning behind the terms "training, experience and demonstrated proficiency." Without waiving these objections, providers who submitted claims to Regence for the year prior and year subsequent to May 2000 for CPT code 55845 (defined by the American Medical Association as "Prostatectomy, retropubic radical, with or without nerve sparing; with bilateral pelvic lymphadenectomy, including external iliac, hypogastric, and obturator nodes) include the following:
>
> [list of about 110 physicians names, not including Dr. Robert Weissman]
>
> Contact information for these physicians may be located at www.regence.com, www.wsus.org or www.wsma.org. [sic]

In reply, Regence submitted the declaration of Dwight Johnson. Johnson disputed Hunter's contention that Weissman was not contracted with Regence in the spring of 2000. Johnson stated that Weissman had been contracted with Regence since at least 1994. He explained that the interrogatory response did not list all urologists contracted with Regence, but only those who had submitted claims for the billing code that includes nerve-sparing radical prostatectomy. Johnson further stated that Regence's website, which was substantially similar in 2000, has a "find a doctor" link that permits members to view the entire physician directory or search the directory by specialty, including urology.

Hunter urges that the trial court erred in failing to strike Johnson's declaration because it presented new issues to which Hunter could not respond. See White v. Kent Med. Ctr., Inc., 61 Wn. App. 163, 168, 810 P.2d 4 (1991) (party seeking summary judgment may not raise issues at any time other than in its motion and opening memorandum). Johnson's declaration does not raise a new issue. Rather, the declaration attempted to refute Hunter's characterization

of Regence's interrogatory answer. Hunter's interrogatory did not ask Regence to list all contracted urologists, and Regence's response did not claim to do so. Thus, Hunter's assertion that Weissman was not a contracted urologist misinterpreted the interrogatory response. The trial court properly considered Regence's rebuttal evidence clarifying its interrogatory response. See White, 61 Wn. App. at 168-69 (rebuttal documents are limited to those which explain, disprove, or contradict the adverse party's evidence).

Furthermore, Johnson's statement that Hunter could have found a complete list of all participating urologists by searching Regence's website was duplicative of information already included in the record. The benefit booklet for Hunter's plan stated: "You may also call the number in the Customer Service Directory of this brochure or access our website (http://www.regence.com) for assistance in finding a Preferred Plan provider who can render the services you need." The availability of the website listing shows that had he sought it, Hunter could have obtained a list of all contracted urologists. Johnson's declaration does not assert that the website would have separately and specifically provided Hunter with the names of urologists who could perform the nerve-sparing procedure in particular, as Hunter requested. Any error in failing to strike duplicative evidence is harmless. See Milligan v. Thompson, 110 Wn. App. 628, 634-35, 42 P.3d 418 (2002) (noting that any error in failing to strike repetitive evidence is harmless).

**III. Regence Did Not Have a Duty to Provide Names of Contracted Urologists Who Could Perform the Nerve-Sparing Procedure**

Hunter asked Regence for the names of local urologists who could do the nerve-sparing procedure. Hunter stated that "[o]n at least three occasions I requested that Regence BlueShield identify any physician and hospital in the Seattle area with comparable training, expertise and documented results as Dr. Rodriguez and the Johns Hopkins University Medical Institute." Hunter also asked Regence:

> Tell me who is available locally. Tell me who does it. You're declining to pay me – you know, to pay for my procedure at Johns Hopkins, and because the – ostensibly, the nerve-sparing radical prostatectomy is available locally. Who?

The answer was: "We don't recommend individual physicians."

Hunter argues that Regence had a clear contractual duty to identify local surgeons who performed nerve-sparing radical prostatectomy. Hunter points to two contractual provisions under which he claims Regence's duty arises. The first is Section 5.1.3: "the Company will furnish, upon a Patient's request, the names of Preferred Plan or Participating Providers." Nothing in Section 5.1.3 requires Regence to provide information on subspecialties or based on the specific procedures a particular provider performs, or provides that Regence will make any comparative judgments as to the relative training or experience of its contracted physicians.[6] As the benefit booklet states, a list of contracted

[6] In fact, Washington law discourages held carriers from controlling, influencing, or participating in health care decisions. Health carriers are held to the accepted standard of care for health care providers when arranging for the provision of medically necessary services. RCW 48.43.545(1)(a). However,

> [i]t is a defense to any action or liability asserted under this section against a health carrier that . . . Neither the health carrier, nor any employee, agent, or ostensible agent for whose conduct the health carrier is liable under subsection (1)(b) of this section, controlled, influenced, or participated in the health care decision[.]

RCW 48.43.545(4)(b). Were Regence to distinguish between its provider's skills and

physicians can be obtained on the Regence website. Hunter also points to Section 8.3.2, which relates to second surgical opinions. Section 8.3.2 states that Regence will provide the names of physicians who could provide a second opinion. Hunter was not seeking a second surgical opinion, and the language at issue is not relevant. Nor has he shown that this language necessarily requires individual referral. It could also be read to mean that a list of physicians within the practice area (such as urology) would be provided.

Hunter has not shown any contractual provision that imposes a duty on Regence to provide the names of physicians who perform a particular procedure. The contract does not contain any language requiring Regence to identify its providers with the specificity that Hunter sought. Hunter has not identified any extra-contractual source for such a duty.

**IV. Regence Did Not Act in Bad Faith in Investigating Hunter's Claim Prior to Denying It**

Hunter argues that Regence failed to conduct a reasonable investigation prior to denying his request for preauthorization. The exact nature of Regence's duty of good faith is unclear. "There is some question about the extent to which insurance law applies to" health care service contractors. Brown v. Snohomish County Phys. Corp., 120 Wn.2d 747, 753, 845 P.2d 334 (1993) (citing RCW 48.44.020(1) and 48.44.309 as potentially conflicting authority). Regence is a health care service contractor, which is defined as

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experience, it could arguably be influencing or participating in the health care decision. The statute does not clearly require or prohibit such action by Regence, but implies that Regence should not influence or participate in such decisions. We do not resolve the question of whether Regence would face liability under this statute by distinguishing between providers or identifying providers who do particular procedures.

> [a]ny corporation, cooperative group, or association, which is sponsored by or otherwise intimately connected with a provider or group of providers, who or which not otherwise being engaged in the insurance business, accepts prepayment for health care services from or for the benefit of persons or groups of persons as consideration for providing such persons with any health care services.

RCW 48.44.010(3). RCW 48.44.020(1) provides that health care service contractors are not subject to the laws relating to insurance if the heath care services are rendered by the contractor or a participating provider. But RCW 48.44.309 provides that "It is, therefore, declared to be in the public interest that [prepaid health care service agreements] as a form of insurance be regulated under the police power of the state to assure that all the people have the greatest access to health care services."

Hunter also relies on WAC 284-30-330, which provides that "[r]efusing to pay claims without conducting a reasonable investigation" is an "unfair method[] of competition and unfair or deceptive act[] or practice[] in the business of insurance." But this regulation does not apply to health care service contractors:

> Generally, in Consumer Protection Act actions against insurers, committing any of the acts defined in WAC 284-30-330 constitutes a per se unfair trade practice, and a single violation of WAC 284-30-330 will be sufficient to constitute an unfair or deceptive act. However, these regulations specifically provide that they do not apply to "health care service contractors, as defined in RCW 48.44.010." WAC 284-30-320(4), (5).

Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 151, 930 P.2d 288 (1997) (internal citations omitted).

We need not decide whether or to what extent Regence may be subject to the laws relating to insurance in this case, because even if we assume that the

bad faith standards applicable to insurers apply to Hunter's claims, we conclude that Regence did not act in bad faith.

Hunter's initial communications with Regence at the end of March 2000 regarding the need for out-of-state care were related to Hopkins' record of avoiding side effects. Hunter stated, "I have checked in Seattle, and the most recent surgeon who trained at Brady is a surgeon at VA Mason who is 15 years out of the program and is not current on the state-of-the-art techniques." Hunter also felt "that he can receive better surgical post-operative outcomes from the John Hopkins University Medical Center" where the procedure was pioneered. Hunter felt "that there is no one here in the Seattle area that has as low of post-operative side effects as they have at Johns Hopkins University." Hunter's physician, presumably Gibbons, declined to send a letter of referral because "'there are plenty of fine surgeons here that have been doing these operations for a long time.'"

Fong and Donohue investigated Hunter's claim. Fong concluded that Hunter does have a medical necessity for the procedure, "but there are providers in the area that can provide the care needed." Donohue agreed that the surgery is available in the area, so the contract excluded benefits for treatment at Johns Hopkins. Both Fong and Donohue testified that their standard procedure would have been to contact local providers to see if the procedure was available locally. Donohue admitted that he would not have known from practice experience whether the surgery was available in the area.

However, neither Fong nor Donohue recorded notes documenting such contacts. Because Hunter is the non-moving party, we assume for purposes of our review that there was no further investigation.

Even with these assumptions, Regence did not act in bad faith in its investigation. "What is determinative is the reasonableness of the insurer's action in light of all the facts and circumstances of the case." Indus. Indem. Co. v. Kallevig, 114 Wn.2d 907, 920, 792 P.2d 520 (1990). "Whether an insurer acted in bad faith is a question of fact." Smith v. Safeco Ins. Co., 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). However, questions of fact may be determined as a matter of law if reasonable minds could reach but one conclusion. Smith, 150 Wn.2d at 485.

Hunter requested pre-authorization for out–of–state treatment because he believed that he would receive better treatment than he could receive locally. We understand the urgency of Hunter's request, and the important reasons he articulated for why he preferred the nerve-sparing procedure and why he believed he would receive the best possible care at Hopkins. Also, even though he scheduled a screening appointment with Rodriguez, we do not view this as unwillingness on his part to be treated locally if he was satisfied that he could get adequate treatment locally.

However, Regence was not obligated to qualitatively compare local results with results from Hopkins. The contract provides for out-of-state care only where medically necessary care is not available in Washington state; it

does not provide coverage for the best care in the country. Regence was only obligated to determine that the procedure was available locally. In her notes, Fong wrote that Hunter's treating physician refused to refer him to Johns Hopkins because "there are plenty of fine surgeons here that have been doing these operations for a long time." Fong's note paraphrases evidence in Regence's files at the time of the investigation, specifically Hunter's letter to Keyes. In this letter Hunter wrote: "Dr. Gibbons will not write a letter, because he says 'there are plenty of fine surgeons here that can do radical prostatectomies.'"

This statement from the treating physician, taken at face value, determines the availability of the procedure in-state. Only if we infer that Regence should have known that Gibbons was not referring to radical prostatectomies using nerve-sparing techniques would we conclude that Regence should have inquired further before denying Hunter's claim in good faith. Such an inference is beyond what is necessary for summary judgment.[7]

Hunter had the burden to come forward with threshold evidence that he needed to go out-of-state to obtain the desired treatment. Hunter attempted but could not meet his burden to show that the necessary care was not available in-state. Regence's initial denial was not in bad faith.

Regence's subsequent investigation on Hunter's mid-April 2000 appeal was also not in bad faith. Regence contacted the desired treating physician, a

[7] Moreover, the record shows that Gibbons knew of local physicians who did the nerve-sparing procedure.

reference provided by that physician to support claims of Hopkins' superior results, and a local physician who informed Regence that the surgery is available locally and with comparable results. Regence then forwarded the denial recommendation to an independent review agency that affirmed Regence's decision. This investigation resolved any intervening question about the

availability of the procedure in the state of Washington. Regence's further investigation on the appeal did not transform the initial investigation into a bad faith investigation.

Hunter argues that Regence's unreasonable investigation is an act under WAC 284-30-330 sufficient to support his CPA claim. Even if we assume that this regulation applies to Regence, Regence did not deny Hunter's claim without a reasonable investigation and Hunter's CPA claim fails. The trial court did not err in dismissing Hunter's bad faith and CPA claims.

**V. The Trial Court Properly Dismissed Hunter's Outrage Claim**

Hunter argues that by refusing to share information about which local doctors performed the nerve-sparing procedure, despite repeated requests for the information, Regence acted outrageously. Outrage is an intentional tort. Kloepfel v. Bokor, 149 Wn.2d 192, 198-99, 66 P.3d 630 (2003). Its basic elements are "(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress." Birklid v. Boeing Co., 127 Wn.2d 853, 867, 904 P.2d 278 (1995) (internal citations and quotations omitted).

Regence did not have a duty to provide Hunter with the names of physicians who perform a particular procedure. Absent such a duty, Regence's failure to provide the names does not qualify as outrageous conduct. See Marsh v. Gen. Adjustment Bureau, Inc., 22 Wn. App. 933-34, 592 P.2d 676 (1979) (dismissing outrage claim against defendant for failure to inform plaintiff about

statute of limitation where no duty to inform existed and no accusation of affirmative misrepresentation was present);

Bowe v. Eaton, 17 Wn. App. 840, 565 P.2d 826 (1977) (dismissing outrage claim where insurer exercised legal right to withdraw offer of advance payment for lost wages). The trial court did not err in dismissing Hunter's outrage claim.

**VI. Attorney Fees**

Hunter seeks attorney fees under Olympic Steamship Co., v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991), or the CPA. Because he does not prevail, he is not entitled to an award of fees.

We affirm.

Appelwick, C.J.

WE CONCUR:

Cox, J.

Becker, J.